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# Decision

**Matter of:** BluePath Labs, LLC--Costs

**File:** B-417960.4

**Date:** May 19, 2020

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Wayne A. Keup, Esq., Wayne Keup, PLLC, for the protester.  
Kathleen Ellis, Esq., Department of Veterans Affairs, for the agency.  
Evan C. Williams, Esq., and Stephanie B. Magnell, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

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## DIGEST

GAO denies the protester's request for recommendation of reimbursement of the costs of pursuing protest grounds beyond those conceded by the agency which relate to the protester's challenge to the agency's conduct of discussions, because these other protest grounds are severable from the undisputed ground and were not otherwise independently clearly meritorious.

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## DECISION

BluePath Labs, LLC, a small business of Washington, District of Columbia, requests that our Office recommend that the Department of Veterans Affairs (VA) reimburse BluePath's reasonable costs of filing and pursuing its protest, including reasonable attorney's fees. The protester previously challenged the award of a contract by the VA to Rios Partners pursuant to request for quotations (RFQ) No. 36C24E19Q0127, which was issued for research analysis services.

In response to the protester's request for reimbursement, the VA agrees to reimburse the protester for its costs of pursuing its challenge to the agency's conduct of discussions. We deny the request for a recommendation for reimbursement of any other costs.

## BACKGROUND

On July 30, 2019, the VA issued the RFQ as a service-disabled veteran-owned small business set-aside under the commercial item procedures of Federal Acquisition Regulation (FAR) subpart 12.6. Agency Report (AR), Tab 3, RFQ at 2-4; Contracting

Officer's Statement (COS) at 1.<sup>1</sup> The RFQ contemplated the award of a fixed-priced contract with a 1-year base period and four 1-year option periods. RFQ at 5, 8, 34.

The RFQ sought quotations for the production of scientific portfolio analyses of research topics, such as suicide prevention, opioid use/pain management, traumatic brain injury, post-traumatic stress disorder, and other chronic diseases prevalent in the U.S. veteran population. *Id.* at 7. The solicitation provided for award on a best-value tradeoff basis--using the comparative evaluation procedures of FAR 13.106-2(b)(3)--considering the following factors: technical, past performance, and price.<sup>2</sup> *Id.* at 2.

As relevant here, under the technical factor, vendors were required to demonstrate an adequate understanding of the agency's requirement and the nature of the work to be performed under the RFQ. *Id.* at 3. Under the past performance factor, the RFQ instructed vendors to provide up to five past performance references for contracts of similar type, scope, size and complexity to the work sought by the RFQ. *Id.* The RFQ established that the agency's evaluation would be based on the depth, breadth, relevancy, and recency of the vendor's past performance references. *Id.*

Prior to the August 14 deadline, the VA received quotations from four vendors, including those of BluePath and Rios Partners. COS at 2. On August 20, after the agency evaluated the quotations received, the contracting officer requested, via email, that Rios Partners clarify points related to its price assumptions, and also provide any price discounts possible. *Id.* The next day, August 21, Rios Partners provided the requested information and modified its quotation to include a one percent discount from its original quotation. *Id.* On August 30, the agency awarded a contract under the RFQ to Rios Partners. *Id.*

On September 9, BluePath filed a protest with our Office, which was docketed as B-417960. In its protest, BluePath generally argued that the agency did not properly evaluate the vendors' past performance. Protest, B-417960, at 3. Prior to filing its agency report in response to the protest, the agency notified our Office that it intended to take corrective action by re-evaluating quotations. Notice of Corrective Action, Sept. 23, 2019. On September 27, we dismissed the protest, finding that the proposed corrective action rendered the protest academic. *BluePath Labs, LLC*, B-417960, Sept. 27, 2019 (unpublished decision).

On October 30, the agency completed its corrective action and again awarded a contract under the RFQ to Rios Partners, at a value of \$1,168,417. COS at 3. On November 12, BluePath filed another protest with our Office, this time arguing that the

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<sup>1</sup> With the exception of the filings related to the instant request for a recommendation for reimbursement, citations in this decision are to the record in the underlying protest and supplemental protest, docketed as B-417960.2 and B-417960.3, respectively.

<sup>2</sup> The RFQ refers to these evaluation factors as "value indicators." *Id.* at 2.

agency unreasonably evaluated vendors' past performance and unreasonably evaluated BluePath's proposal under the technical factor. Protest, B-417960.2, at 3-7. The protester also asserted that these errors caused the agency to make an improper best-value decision. *Id.* at 8.

On November 25, the VA submitted its report in response to the protest. Electronic Protest Docketing System (Dkt.) No. 7. As relevant to this request, the agency's report contained the past performance volume of the quotation submitted by Rios Partners, as well as documentation of the agency's evaluation thereof. See AR, Tab 8, Rios Partners Quotation, Past Performance Volume; AR, Tab 5, Re-Evaluation & Best-Value Determination. The agency argued that its evaluation was reasonable and consistent with the solicitation. Memorandum of Law (MOL) at 4-16.

On December 3, BluePath filed a supplemental protest, contending that the agency improperly conducted discussions only with the awardee, Rios Partners. Supp. Protest, B-417960.3, at 1-2. On December 9, after receiving an extension of time to file its comments, BluePath filed its comments which, as relevant here, included an allegation that the agency improperly considered past performance references of [DELETED], a separate and distinct entity from Rios Partners. Dkt. 13, Dec. 3, 2019; Comments at 3-5. On December 11, the agency filed a supplemental agency report, contending that BluePath did not suffer any competitive prejudice as a result of its communications with Rios Partners. Dkt. 17, Dec. 11, 2019; Supp. MOL at 4-10. On December 16, BluePath filed comments on the supplemental agency report. Dkt. 19, Dec. 16, 2019.

On January 27, 2020, after full development of the record, the GAO attorney assigned to the protest conducted an "outcome prediction" alternative dispute resolution (ADR) conference. See GAO Notice, Jan. 21, 2020. During the ADR conference, the GAO attorney advised that he would likely draft a decision sustaining the protest based on the agency's failure to conduct equal discussions. Additionally, the GAO attorney advised that his review did not identify merit in any other protest allegation.

On January 29, the VA advised our Office of its intent to take corrective action by conducting discussions, re-evaluating quotations, and making a new best-value decision. Notice of Corrective Action, Jan. 29, 2020. On February 4, based upon the agency's proposed corrective action, we dismissed the protest as academic. *BluePath Labs, LLC*, B-417960.2; B-417960.3, Feb. 4, 2020 (unpublished decision). Following dismissal of the protest, BluePath filed this request that GAO recommend the reimbursement of its costs of filing and pursuing its protests.

## DISCUSSION

BluePath asks our Office to recommend that the VA reimburse the protester for its protest costs with respect to all issues pursued in its prior protests (*i.e.*, B-417960, B-417960.2, and B-417846.3). Req. for Reimbursement at 1-2.

Although the agency does not contest reimbursement of costs related to the unequal discussions protest ground, the agency argues that the protester should not be

reimbursed for its remaining protest grounds, which the agency contends were neither clearly intertwined with the meritorious protest ground nor independently clearly meritorious. Agency Response at 5-9. Based upon our review of the record, we conclude that reimbursement of BluePath's challenge to the agency's conduct of discussions should be severed from the remainder of the protest grounds.

As a general rule, our Office recommends that a successful protester be reimbursed the costs incurred with respect to all the issues pursued, not merely those upon which it has prevailed. *The Salvation Army Cmty. Corrs. Program--Costs*, B-298866.3, Aug. 29, 2007, 2007 CPD ¶ 165 at 7. In appropriate cases, however, we have limited our recommendation for the award of protest costs where a part of those costs is allocable to an unsuccessful protest issue that is so clearly severable from the successful issues as to essentially constitute a separate protest. *Octo Consulting Grp., Inc.--Costs*, B-414801.4, Dec. 14, 2017, 2018 CPD ¶ 52 at 3. In determining whether protest issues are so clearly severable as to essentially constitute separate protests, our Office considers, among other things, whether the successful and unsuccessful arguments share a common core set of facts, are based on related legal theories, or are otherwise not readily severable. *Genesis Bus. Sys.--Costs*, B-411264.11, Dec. 10, 2015, 2015 CPD ¶ 389 at 3.

In applying these principles, we have severed costs arising from allegations of misevaluation under separate evaluation factors on the basis that they are not clearly intertwined. For example, challenges to a past performance evaluation were not clearly intertwined with clearly meritorious challenges to the technical factor evaluation and the resulting tradeoff. *Chags Health Info. Tech., LLC, et al.--Costs*, B-413116.38, *et al.*, Apr. 19, 2017, 2017 CPD ¶ 126 at 4, citing *Genesis Bus. Sys.--Costs*, *supra* at 4; see also *Carney, Inc.--Costs*, B-408176.13, Feb. 14, 2014, 2014 CPD ¶ 82 at 6 (severing costs for alleged misevaluation of price from clearly meritorious challenge to technical capability factor evaluation); *Loyal Source Gov't Servs., LLC--Costs*, B-407791.4, Feb. 14, 2014, 2014 CPD ¶ 139 at 4 (severing costs for evaluation challenges from clearly meritorious challenge to adequacy of best-value tradeoff rationale). In a similar fashion, we severed the costs for challenges to the evaluation of the awardee and to the agency's alleged failure to amend a solicitation because those issues were not clearly intertwined with a clearly meritorious allegation of unequal discussions. *VSE Corp.; The Univ. of Hawaii--Costs*, B-407164.11, B-407164.12, June 23, 2014, 2014 CPD ¶ 202 at 8.

On the record before us, we find no basis to conclude that the remaining facts and legal arguments are clearly intertwined with the challenge to the agency's conduct of discussions. In this regard, BluePath's other protest allegations focused on distinct issues related to the agency's evaluation of quotations, which are unrelated and not intertwined with BluePath's contention that the agency engaged in unequal discussions. In other words, whether the agency's evaluation was reasonable concerns legal theories and underlying facts that are distinct and severable from those relevant to whether the agency improperly engaged in discussions with only one vendor. *Focused Mgmt., Inc.--Costs*, B-404029.6, Oct. 3, 2011, 2011 CPD ¶ 204 at 4.

Additionally, BluePath's remaining protest grounds were not independently clearly meritorious, and thus provide no basis on which to recommend reimbursement of protest costs. *Deque Sys.--Costs, supra*, at 6. When a procuring agency takes corrective action in response to a protest, our Office may recommend under 4 C.F.R. § 21.8(e) that the agency reimburse the protester its reasonable protest costs where, based on the circumstances of the case, we determine that the agency unduly delayed taking corrective action in the face of a clearly meritorious protest, thereby causing the protester to expend unnecessary time and resources to make further use of the protest process in order to obtain relief. *CloudFirstJV, LLC--Costs*, B-416872.4, May 10, 2019, 2019 CPD ¶ 177 at 3.

A protest is clearly meritorious when a reasonable agency inquiry into the protest allegations would show facts disclosing the absence of a defensible legal position. *Abacus Tech. Corp.--Costs*, B-416390.6, Sept. 27, 2019, 2019 CPD ¶ 349 at 7. As a prerequisite to our recommending that costs be reimbursed where a protest has been settled by corrective action, not only must the protest have been meritorious, but it also must have been clearly meritorious, *i.e.*, not a close question. *InfraMap Corp.--Costs*, B-405167.3, Mar. 26, 2012, 2012 CPD ¶ 123 at 3. Here, none of the allegations raised by BluePath in its initial protest meet the high bar set by the clearly meritorious standard.<sup>3</sup> *Northrop Grumman Sys. Corp.--Costs*, B-412278.6, Feb. 7, 2017, 2017 CPD ¶ 68 at 5.

For example, BluePath challenged the agency's evaluation of quotations under the past performance factor, generally contending that its past performance was more similar to the type of work contemplated by the RFQ. Protest, B-417960.2, at 3-4. As support,

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<sup>3</sup> The protester also seeks a recommendation from our Office that the agency reimburse its costs of pursuing its earlier protest, B-417960.1, in which it also alleged the agency's evaluation of past performance was unreasonable. Req. for Entitlement at 1-2. As stated above, the agency took corrective action in response to that protest prior to the agency report deadline. While, as a general rule, we will not find undue delay when an agency takes corrective action prior to the deadline for the agency's report, this is not the case where an agency implements corrective action that fails to address a meritorious issue raised in the protest that prompted the corrective action, such that the protester is put to the expense of subsequently protesting the very same procurement deficiency. See *Louisiana Clearwater, Inc.--Recon & Costs*, B-283081.4, B-283081.5, Apr. 14, 2000, 2000 CPD ¶ 209 at 6. Our Office has explained in several decisions, however, that the principles set forth in *Louisiana Clearwater* address a narrow range of circumstances, namely, those where an agency fails to implement corrective action in good faith in response to a clearly meritorious protest. *Bluehorse Corp.--Recon.*, B-414383.3, Aug. 28, 2017, 2017 CPD ¶ 267 at 3. Here, the record does not demonstrate that the agency failed to implement prompt corrective action with respect to BluePath's general challenge to the agency's evaluation of past performance raised in its earlier protest. See *Ace Info Sols., Inc.--Costs*, B-414650.27, May 14, 2019, 2019 CPD ¶ 179 at 6-7.

BluePath asserted that the breadth and depth of its subcontractor's experience was superior to that of Rios Partners. *Id.* In response, the VA first argued that the past performance of BluePath's subcontractor was irrelevant because the solicitation, as amended, provided that the agency would only evaluate past performance information for prime vendors, and not their proposed subcontractors. MOL at 5-6. The agency also argued that the agency reasonably assigned BluePath's past performance a rating of neutral because none of its experience was related to the healthcare field. *Id.* at 6. In its comments, BluePath conceded that under the solicitation the agency should not have evaluated its subcontractor's past performance, but nevertheless argued that its own past performance merited higher than a rating of neutral. Comments at 6-7. Based upon our review of the record, we are not convinced that BluePath's challenge to the agency's evaluation of its past performance was meritorious, let alone clearly meritorious. See *Triple Canopy, Inc.--Costs*, B-310566.9, B-400437.4, Mar. 25, 2009, 2009 CPD ¶ 62 at 4.

Related to its challenge to the agency's past performance evaluation, BluePath raised for the first time in its comments an argument that the agency violated the RFQ by considering past performance references of [DELETED]--an entity BluePath contended was separate and distinct from Rios Partners. Comments at 3-5. Our Bid Protest Regulations do not contemplate the piecemeal presentation or development of protest issues through later submissions citing examples or providing alternate or more specific legal arguments missing from earlier general allegations of impropriety. See *Sealift Inc.*, B-405705, Dec. 8, 2011, 2011 CPD ¶ 271 at 2-3 n.1. Here, the agency provided the protester with all of the information needed to raise this allegation on November 25, 2019, when it filed its report containing [DELETED] past performance quotation and documentation of the agency's past performance evaluation. Dkt. No. 7 (reflecting agency report filing on Nov. 25, 2019); AR, Tab 8, Rios Partners Quotation, Past Performance Volume; AR, Tab 5, Re-Evaluation & Best-Value Determination. Since BluePath did not raise this allegation until it filed its comments on December 9, which was more than 10 days from November 25, this protest argument was untimely.<sup>4</sup> 4 C.F.R. § 21.2(a)(2).

## CONCLUSION

In sum, the agency does not oppose the protester's request to the extent that it relates to costs related to the challenge to the agency's conduct of discussions, and we decline to recommend reimbursement for BluePath's pursuit of any additional protest grounds.

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<sup>4</sup> As noted above, we granted the protester's request for an extension to file comments on December 9. Dkt. No. 13. Our notice specifically cautioned the protester that such "extension [. . .] does not toll the time for filing supplemental protest grounds." *Id.*; see also *R&K Contractors, Inc.*, B-292287, July 23, 2003, 2003 CPD ¶ 149 at 5 ("The fact that our Office granted the protester's request for a 3-day extension on filing its comments, did not, and cannot, waive the timeliness requirements for filing new bid protest issues.").

As discussed above, we find that BluePath's other protest grounds are severable from the uncontested protest ground and were not otherwise independently clearly meritorious.

The request is denied.

Thomas H. Armstrong  
General Counsel